Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

LARRY COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

A. PATRICIA FROHMAN
Attorney for Petitioner
4832 46th Street, N.W.
Washington, D.C. 20016
(202) 537-6114

72214

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, Inc.

30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether an employee who is subjected to wrongful treatment by his employer because of discriminatory motives is limited to seeking relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, or may pursue alternative causes of action.

2. Certiorari should be granted to clarify whether a federal employee, such as petitioner, who has been subjected to a continuous and malicious pattern of harassment and emotional distress by his federal employer can bring an action under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, for imposition of emotional distress.

3. Certiorari should be granted to settle the question of whether a former federal employee can bring an action under the Federal Tort Claims Act for emotional distress caused by post employment actions of his former federal employer.

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OPINIONS BELOW

On April 24, 1997, the United States Court of Appeals for the Ninth Circuit issued its Memorandum Opinion affirming the decision of the District Court. On July 21, 1997, petitioner's petition for rehearing was denied. The Ninth Circuit held that its memorandum opinion was not to be published or cited except as provided by Circuit Rule 36-3.

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision and judgment of April 24, 1997, of the United States Court of Appeals for the Ninth Circuit and its denial dated July 21, 1997, of the petition for rehearing. The judgment affirmed the lower court's dismissal of petitioner's complaint. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 2674 provides in pertinent part:

> § 2674. Liability of the United States
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> * * *
>
> With respect to any claim under this chapter, the United States shall be entitled

to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * *

STATEMENT OF THE CASE

Petitioner, Larry Cooper, is a former civilian employee of the United States Navy with approximately twenty years of service at the Naval Supply Center, San Diego, California (hereinafter "agency"), doing clerical and warehouse work. He began working for the agency in 1971 as part of a summer youth program. Because of his excellent work performance he was hired in 1972 as a full-time employee, and he continued working there, except for one year in the United States Army Reserve, until he was placed off work for medical reasons in October 1990, and then removed as of April 1, 1991.

During his career Mr. Cooper received over fifteen awards and citations for excellent performance. He also achieved recognition in the employees' union for his union work and representation of employees. However, apparently because of his union activities, Mr. Cooper became the victim of a continuous pattern of acts of discrimination and harassment by his agency supervisors and management, commencing as early as 1983 and continuing thereafter throughout his employment with the agency, and beyond.

The acts of harassment included constant ridicule, watching and following by his supervisors, even when he went to the restroom, vulgar personal remarks, threats of physical harm by

his supervisors and daily verbal abuse, refusal to allow him to seek medical care for chest pain, a break-in of his personal locker engineered by management, as well as two break-ins of his automobile, and being sent to a building where he was overcome by toxic fumes.

Mr. Cooper obtained several favorable settlements and cease and desist orders as a result of Fair Labor Relations Act charges against management, as well as several favorable EEO settlements. However, those orders and settlements were repeatedly violated by management; and on a daily basis until October 20, 1990, his last day of work, he continued to be harassed, threatened, followed, monitored, assigned undesirable job duties, isolated, embarrassed and demoralized in front of other employees. He was forced to go through numerous involuntary transfers, refused job performance evaluations, overlooked for numerous promotions, and denied legitimate sick leave.

As a result of the ongoing harassment he was placed on disability during the period August 28, 1989 through December 13, 1989. Upon his return to work, the harassment and humiliation continued and by October 1990 his hostile work environment had become so unbearable that he was unable to continue working. On October 25, 1990, the doctor at the Naval Station Dispensary placed him off work and recommended that he contact an Office of Workers Compensation representative and a private physician.

While still on medical leave and under a doctor's care he received several harassing letters from the agency, culminating in a letter informing him that he was being terminated from employment as of April 1, 1991.

Even after his removal, the agency continued to inflict emotional distress upon Mr. Cooper by engaging in a series of

harassing actions which included knowingly filing a false statement with the Merit Systems Protection Board (MSPB) as to his retirement, thus causing his MSPB appeal of his discharge to be dismissed and delayed for approximately seventeen months before the dismissal was reversed, knowingly providing false information to a congressional representative, refusing to assist him with his disability retirement rights, maliciously placing a wrongful debt against him, and providing incorrect information concerning his record of performance, attendance, and conduct.

Mr. Cooper's treating physicians and other medical experts have determined that the years of harassment and severe emotional stress to which he was subjected by his former employer have caused a major depression and severe anxiety disorder from which he still suffers. His emotional illness has prevented him from working and caused the loss of his home and family.

On July 22, 1994, Mr. Cooper brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq.* for intentional and negligent infliction of emotional distress by employees and management of the Naval Supply Center, alleging a pattern of discrimination, retaliation, and harassment against him starting in 1983 and continuing thereafter, as described above, but with further details and elaboration. His complaint was timely filed in the United States District Court for the Southern District of California following denial on January 24, 1994, of the administrative claim which he had filed with the Department of the Navy pursuant to 28 U.S.C. § 2675.

The district court granted the government's motion to dismiss Mr. Cooper's original complaint without prejudice, on grounds that his causes of action were preempted by Title VII of the Civil Rights Act of 1964 (Title VII) and the Civil Service Reform Act of 1978, which is scattered throughout Title 5 of the United States Code (CSRA).

Mr. Cooper filed an amended complaint under the FTCA for negligent and intentional infliction of emotional distress. The government again moved to dismiss and the government's motion again was granted, on grounds that the FTCA causes of action were either time barred or preempted by Title VII or the CSRA. The government had also claimed that his cause of action was preempted by the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101, *et seq.*, but the district court found that it was unnecessary to consider that question.

Mr. Cooper appealed *pro se* to the Ninth Circuit, pointing out that the administrative claim which he had filed on October 30, 1992 had alleged a concerted and orchestrated harassment by management resulting in his removal April 1, 1991, and that the prior alleged instances of harassment were not time barred since they formed part of a continuing tort of infliction of emotional distress, for which the statute of limitations does not start to run until the last tortious act, citing *Gross v. United States*, 676 F.2d 295, 299-300 (8th Cir. 1982).

He also pointed out that in alleging a pattern of tortious conduct, racial discrimination was mentioned in the original complaint and amended complaint as merely one of the agency's motives in a pattern of infliction of emotional distress, and that the possibility of proving racial discrimination did not preclude him from pursuing alternative remedies which do not require proof of discrimination. He also urged that the CSRA should not be held to preempt FTCA remedies in the situation of long and continuous malicious abuse and harassment by the agency involved in this case.

On April 24, 1997, the Ninth Circuit issued a memorandum opinion, not for publication, affirming the district court's dismissal. On July 21, 1997, the Court of Appeals denied petitioner's motion for rehearing.

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER AN EMPLOYEE WHO IS SUBJECTED TO WRONGFUL TREATMENT BY HIS EMPLOYER BECAUSE OF DISCRIMINATORY MOTIVES IS LIMITED TO SEEKING RELIEF UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e, *et seq.*, OR MAY PURSUE ALTERNATIVE CAUSES OF ACTION.

In affirming dismissal of this case the Ninth Circuit found that petitioner's claims were preempted by either Title VII or by the CSRA. The circuit court held that Cooper's FTCA claims were preempted by Title VII to the extent that they were premised upon racial discrimination, citing *Brown v. General Services Administration*, 425 U.S. 820 (1976), unless the allegations fit a "highly personal violation" exception to Title VII preemption, citing *Otto v. Heckler*, 781 F.2d 754 (9th Cir.), *amended by* 802 F.2d 337 (9th Cir. 1986) and *Kent v. Howard*, 801 F. Supp. 329 (S.D. Cal. 1992).

In fact, although some of the petitioner's allegations are of "highly personal" conduct (including vulgar personal remarks, threats of physical harm, and breaking into his personal locker and automobile), petitioner submits that *Otto v. Heckler* and *Kent v. Howard* are not relevant to this case since they dealt with state tort claims brought against individual supervisors; and that the Ninth Circuit is improperly injecting this concept into a case where the respondent is not attempting to sue individual supervisors, but is suing the federal government.

Further, this case is not brought under Title VII and does

not seek relief under Title VII.[1] It alleges a pattern of wrongful, malicious conduct which inflicted emotional distress.

Respondent mentioned discrimination as one of the motives for agency action in this case, but he did not limit his allegations to racial discrimination, and alleged that the harassing actions also were taken in retaliation for his union involvement and activities.

Brown v. GSA, supra, upon which the Ninth Circuit relies, holds that a racial discrimination suit must be brought under Title VII after exhausting the administrative remedies required for such suits, but it does not hold that an employee is precluded from pursuing any available alternative remedies which do not require proof of discrimination. Accordingly, respondent urges this Court to consider and reject the Ninth Circuit's holding that an employee who is subjected to wrongful treatment by his employer because of discriminatory motives, as well as other motives, is limited to seeking relief under Title VII, unless he has alleged "highly personal violations."

---

1. In fact, a companion case brought by petitioner under Title VII and the Rehabilitation Act for race and handicap discrimination is currently pending in the United States District Court for the Southern District of California. The government moved to dismiss that case on jurisdictional grounds because it was filed in the district court as a "mixed case" after the government had obtained dismissal of petitioner's "mixed" appeal to the MSPB as moot by substituting petitioner's disability retirement for the removal from which petitioner had appealed. The district court transferred the case to the Federal Circuit which affirmed the dismissal of the MSPB appeal as moot and then transferred the case back to the district court. Petitioner anticipates that the government may try again to have the case dismissed.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A FEDERAL EMPLOYEE, SUCH AS PETITIONER, WHO HAS BEEN SUBJECTED TO A CONTINUOUS AND MALICIOUS PATTERN OF HARASSMENT AND EMOTIONAL DISTRESS BY HIS FEDERAL EMPLOYER CAN BRING AN ACTION UNDER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 2671, *et seq.*, FOR IMPOSITION OF EMOTIONAL DISTRESS.

The Ninth Circuit held that any of petitioner's claims not preempted by Title VII are preempted by the CSRA, citing *Rivera v. United States*, 924 F.2d 948 (9th Cir. 1991) and *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991).

In *Saul* the Ninth Circuit held that a federal employee could not bring state and constitutional tort claims based on allegations that his supervisor had seized and opened personal mail addressed to him at the office, thereby violating his constitutional rights and invading his privacy, had twice defamed him by a letter placed in his personnel file and during a phone call to a congressional aide, and had inflicted emotional distress by prohibiting him from sitting at his desk before 8 a.m. and from coming to work on weekends. In affirming summary judgment for the government the Ninth Circuit found that the actions alleged came within the definition of "personnel actions" and "prohibited personnel practices" as set forth by the CSRA in 5 U.S.C. § 2302 and that the CSRA precluded and preempted the plaintiff's causes of action.

In *Rivera* the Ninth Circuit held that the CSRA precluded relief to a federal employee under the FTCA for alleged retaliatory harassment by her supervisor. The circuit court noted that the only court of appeals to address directly the question of

whether the CSRA precludes suit under the FTCA was *Premachandra v. United States*, 739 F.2d 392 (8th Cir. 1984), which had been brought by a government physician under the FTCA for the anguish and losses suffered upon his discharge. In that case the court of appeals found that the CSRA precluded relief.

The court of appeals in *Rivera* also noted that "[w]hile the Supreme Court has not directly considered the relationship between the CSRA and the FTCA, in two cases the Court has expounded on the comprehensive nature of the remedial scheme embodied in the CSRA and held that the scheme precludes other types of remedies," citing *Bush v. Lucas*, 462 U.S. 367, 388, 103 S. Ct. 2404, 2417, 76 L. Ed. 2d 648 (1983) (involving a First Amendment *Bivens* claim), and *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988) (involving a suit for backpay under the Tucker Act, 28 U.S.C. § 1491).

On the other hand, FTCA suits against the federal employer by federal employees for infliction of emotional distress have been approved and upheld in other contexts, even by the Ninth Circuit. *See, e.g., Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990); *see also, Santiago-Ramirez v. Secretary of Dept. of Defense*, 984 F.2d 16 (1st Cir. 1983); *Gergick v. Austin*, 764 F. Supp. 580 (W.D. Mo. 1991); *Underwood v. U.S. Postal Service*, 724 F. Supp. 968 (M.D. Tenn. 1990).

Moreover, in *Brock v. United States*, 64 F.3d 1421, 1425 (9th Cir. 1995), the Ninth Circuit found that a federal employee who had suffered rape and sexual abuse at the hands of her supervisor could bring an FTCA action for negligent supervision against the government, and rejected the government's claim that such an action was preempted by the CSRA.

The Supreme Court in *Bush* and *Fausto* indicated the

comprehensive nature of the remedial scheme embodied in the CSRA by Congress. Nevertheless, the Federal Tort Claims Act has been amended since the passage of the CSRA Act of 1978, *see* Pub. L. 100-694 effective Nov. 18, 1988, and Congress has never seen fit to include a provision precluding FTCA suits by federal employees.

Moreover, cases such as *Rivera*, *Saul*, and *Premachandra*, which limited federal employees to CSRA remedies, involved well-defined, on-the-job personnel actions for which the employee could have sought relief through the CSRA with relative ease. The agency's pattern of conduct in the instant case would have required petitioner to raise constant challenges through CSRA procedures and the Office of Special Counsel; and even when petitioner challenged agency action and obtained favorable orders and agreements, the pattern of harassment continued.

Petitioner urges that in the situation here involved, with a pattern of years of frequent and intentional abuse and harassment which has caused the petitioner severe emotional injury, inability to work, and personal and financial loss, this Honorable Court should consider and reject the Ninth Circuit's holding that his right to sue the government for emotional injury has been preempted by the CSRA.

III.

CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION OF WHETHER A FORMER FEDERAL EMPLOYEE CAN BRING AN ACTION UNDER THE FEDERAL TORT CLAIMS ACT FOR EMOTIONAL DISTRESS CAUSED BY POST EMPLOYMENT ACTIONS OF HIS FORMER FEDERAL EMPLOYER.

Petitioner alleged in this action that the agency continued to inflict emotional distress upon him following his removal by conduct including, but not limited to, filing a motion to dismiss his MSPB appeal from his discharge knowingly based on a false statement, wrongfully and maliciously placing a debt against him, providing wrong information regarding his employment situation, performance and conduct, and providing wrong information about him to a congressional representative.

5 U.S.C. §§ 2301 and 2302, which are relied upon by the Ninth Circuit in *Saul v. United States, supra*, 928 F.2d at 833-834, as limiting remedies available for "prohibited personnel practices" refer repeatedly to "employees" and "applicants for employment."

Recently this Court ruled in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) that for purposes of Title VII relief the term "employees" includes former employees. However, the rationale of that decision is not necessarily applicable to the CSRA. Accordingly this Court is respectfully requested to consider and resolve whether the CSRA precludes former federal employees from suing under the FTCA for injuries caused by the federal employer's post employment actions.

CONCLUSION

Petitioner respectfully submits that he has presented important questions of federal law relating to the preemptive effect of Title VII and the Civil Service Reform Act, and the rights of federal employees to sue under the Federal Tort Claims Act, and that this Honorable Court should resolve and settle these questions.

Respectfully submitted,

A. PATRICIA FROHMAN
Attorney for Petitioner
4832 46th Street, N.W.
Washington, D.C. 20016
(202) 537-6114

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 24, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-55363

D.C. No. CV-94-01167-JSR

LARRY COOPER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted April 21, 1997**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Cooper's request for oral argument is denied.

Appendix A

Before: BROWNING, THOMPSON, and HAWKINS, Circuit Judges.

Larry Cooper appeals pro se the district court's dismissal of his claim for intentional and negligent infliction of emotional distress brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674 (1994). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Kruso v. International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989), and we affirm.

Cooper contends that the district court erred by finding that some of his claims were preempted by Title VII. We disagree.

Title VII provides the exclusive federal jurisdiction for claims of discrimination in federal employment. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 828-29 (1976); *see also White v. General Servs. Admin.*, 652 F.2d 913, 917 (9th Cir. 1981) (Title VII is the sole remedy for a race discrimination claim by a federal employee). Title VII preemption, however, does not apply to "highly personal violations beyond the meaning of discrimination." *See Otto v. Heckler*, 781 F.2d 754 (9th Cir.) *amended by* 802 F.2d 337 (9th Cir. 1986).

In his complaint, Cooper alleged that the defendant subjected him to "a pattern of intentional acts of racial discrimination, harassment, reprisal and retaliatory action at his work." Cooper further alleged that he was given a potentially dangerous work assignment because of his racial and ethnic origin, and that he was placed on disability partially because of the defendant's racial discrimination. Based on these allegations, we conclude that the district court properly determined that Cooper's claims were preempted by Title VII to the extent that they were premised on racial discrimination. *See Brown*, 425 U.S. at 828-29. In addition, we agree with the district court that Cooper's allegations do not fit the "highly personal violation" exception to Title VII preemption. *See Otto*, 781 F.2d at 756-

57; *cf. Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987); *Kent v. Howard*, 801 F. Supp. 329, 332 (S.D. Cal. 1992).

Cooper also contends that the district court erred by finding that Cooper's remaining claims were preempted by the Civil Service Reform Act ("CSRA"). This contention also lacks merit.

The CSRA preempts suits brought by federal employees under the FTCA which are based on "prohibited personnel practices." *See Rivera v. United States*, 924 F.2d 946, 951-52 (9th Cir. 1991). "Prohibited personnel practices" include actions that violate the CSRA's merit system principles. *See Saul v. United States*, 928 F.2d 829, 833 (9th Cir. 1991). "The merit system principles include treating employees fairly and equitably, 'with proper regard for their privacy and constitutional rights,' " and protecting employees against arbitrary action. *Id.* (citation omitted). Congress also intended "prohibited personnel practices" to cover a supervisor's violation of an employee's constitutional and privacy rights. *Id.* at 834.

Here, Cooper alleged that he was constantly harassed and closely monitored in retaliation for his union activity. Cooper further alleged that another Navy employee defamed him to a congressional representative, and that defendants acted to deny or delay payment of his benefits. Because Cooper's allegations relate to or arise out of personnel actions that violate the CSRA's merit system principles, the district court did not err by concluding that Cooper's claims were preempted by the CSRA insofar as they fell outside of Title VII preemption. *See Rivera*, 924 F.2d at 951-52.

AFFIRMED.[1]

---

1. Because we find that Cooper's claims are preempted by either Title VII or the CSRA, we need not address Cooper's contention that his claims are not barred by the FTCA's two-year statute of limitation.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED JANUARY 9, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NUMBER: 94-1167-R(CM)

LARRY COOPER

V.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss without leave to amend is granted. Plaintiff's amended complaint is dismissed without leave to amend.

January 9, 1996
Date

Roberta Westdal
Clerk

MRussell s/ M. Russell
(By) Deputy Clerk

ENTERED ON January 9, 1996

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED JANUARY 8, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 94-1167-R (CM)

LARRY COOPER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT LEAVE TO AMEND

This matter comes before the Court on Defendant's second motion to dismiss. Defendant United States of America argues that Plaintiff's Federal Tort Claims Act ("FTCA") causes of action are time barred and are preempted by Title VII of the Civil Rights Act of 1964, the Civil Service Reform Act ("CSRA"), and the Federal Employees Compensation Act ("FECA"). For the reasons given below, Defendant's motion is granted without leave to amend.[1]

I. Background

Plaintiff's allegations are set forth in more detail in this

1. Pursuant to Southern District of California Local Rule 7.1(d.1.), this Court finds this motion suitable for decision without oral argument.

Court's April 11, 1995, Order. Only the facts relevant to the instant motion are repeated here.

On October 30, 1992, Plaintiff submitted an administrative claim pursuant to 28 U.S.C. § 2675(a) to the Department of the Navy. First Amended Complaint ("FAC") ¶ 5. The Navy denied Plaintiff's claim on January 24, 1994. On July 22, 1994, Plaintiff filed a complaint in this Court listing claims for intentional and negligent infliction of emotional distress pursuant to the FTCA, 28 U.S.C. § 2671 *et seq.* Plaintiff alleged that beginning in 1983 and continuing "until and after" Plaintiff's discharge on April 1, 1991, members of the Navy and Navy employees discriminated against him on the basis of his race and his union activities. Compl. ¶ 7-9.

On April 11, 1995, this Court granted Defendant's motion to dismiss the complaint without prejudice and with leave to amend. With respect to his race-based claims, the Court reasoned that Plaintiff's FTCA claims essentially stated discriminatory employment practices related to his work and were therefore preempted by Title VII. This Court specifically listed Plaintiff's claim that he was terminated while on medical leave as preempted by Title VII. With respect to his claims not based on race this Court held that Plaintiff's claims related to the supervisor/subordinate relationship and were therefore preempted by the CSRA.

On May 17, 1995, Plaintiff filed an amended complaint. On September 12, 1995, Defendant filed the instant motion to dismiss. Defendant argues that Plaintiff's claims are time barred and are still preempted under Title VII and the CSRA.

Appendix C

II. Discussion

A. Applicable Legal Standard

On a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, although a defendant is the moving party, the plaintiff bears the burden of establishing that the Court has subject matter jurisdiction. *See* William Schwarzer, et al., *California Practice Guide, Federal Civil Procedure Before Trial*, § 9:77 (1995). In effect, the court presumes lack of jurisdiction until the plaintiff proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1675 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Statute of Limitations

A tort claim against the United States is "forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). A cause of action "accrues" when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986). Ninth Circuit law states that "timely compliance with 28 U.S.C. § 2401(b) is jurisdictional." *Rosales v. United States*, 824 F.2d 799, 802 (9th Cir. 1987). Thus, unless Plaintiff establishes that he timely complied with § 2401(b), this Court lacks jurisdiction to consider Plaintiff's claims.

Defendant argues that the bulk of Plaintiff's allegations claims are time barred and that this Court already held the remaining allegations to be preempted by Title VII. This Court agrees.

Appendix C

Plaintiff submitted his administrative claim pursuant to 28 U.S.C. § 2675(a) on October 30, 1992. Thus, this Court lacks jurisdiction over any claim accruing prior to October 30, 1990. Plaintiff alleges ongoing harassment and racial discrimination which permeated the Navy and which was directed at Plaintiff as he was transferred from one assignment to another. FAC ¶ 31. However, the allegations primarily involve conduct from 1983 through 1985. FAC ¶¶ 7-28. Two incidents occurred in 1987. FAC ¶¶ 29-30. And Plaintiff alleges few incidents in 1989-90 which occurred prior to October 30, 1990. FAC ¶¶ 31-35. Plaintiff had knowledge of all the events alleged to have occurred before October 30, 1990, and such events are therefore time barred.[2] With respect to the allegations of misconduct occurring after October 30, 1990, Defendant contends they are preempted. As discussed below, this Court agrees.

C. Title VII Preemption

Title VII "provides the exclusive federal jurisdiction for claims of discrimination in federal employment." *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976); *see also White v. GSA*, 652 F.2d 913, 917 (9th Cir. 1981) (Title VII is the sole remedy for a race discrimination claim by a federal employee). If Plaintiff's claims are preempted, this Court lacks subject matter jurisdiction. *See Stallcop v. Kaiser Foundation Hosp.*, 820 F.2d 1024, 1048 (9th Cir. 1987) (preemption is a matter of subject matter jurisdiction).

Title VII preemption, however, does not apply where the

2. Since this Court finds these allegations to be time barred, it need not determine whether they involve highly personal violations to avoid preemption by Title VII. *See Otto v. Heckler*, 781 F.2d 754, 756-57 (9th Cir. 1986); *Kent v. Howard*, 801 F. Supp. 329, 332 (S.D. Cal. 1992).

discrimination goes beyond discrimination in the workplace and involved "highly personal" violations. *Brock v. United States*, 64 F.3d 1421, 1422-23 (9th Cir. 1995) (holding rape to be a highly personal violation not preempted by Title VII's remedy for sexual discrimination); *Otto v. Heckler*, 781 F.2d 754, 756-57 (9th Cir. 1986) (holding supervisor's conduct of making defamatory remarks about plaintiff's sexuality, following her, telephoning her, and placing her in fear of sexual abuse extended beyond employment discrimination actionable under Title VII); *Kent v. Howard*, 801 F. Supp. 329, 3332 (S.D. Cal. 1992) (holding "touching and grabbing the plaintiff's breasts, legs, hips, and buttocks, making obscene gestures with mouth and tongue, attempting to kiss the plaintiff forcibly, following the plaintiff and harassing her as she left work, and describing dimensions of private parts" extended beyond employment discrimination).

In response to Defendant's argument that no allegedly tortious conduct occurred after October 30, 1995, Plaintiff points to his allegation that he was wrongfully terminated on April 1, 1991, and that Defendant continues to deny and delay Plaintiff's benefits. *See* FAC ¶ 36-38. Plaintiff further alleges that his removal "was the culmination of years of concerted, orchestrated harassment, racial discrimination . . ." FAC ¶ 38. However, this Court's April 11, 1995, Order found these allegations to be preempted by Title VII. Other allegedly actionable conduct occurring after October 30, 1990 includes Defendant taking legal action in response to Plaintiff's administrative claims and administrative conduct in general. FAC ¶ 41-42. Plaintiff's allegations which are not time barred simply do not fit the "highly personal violation" exception to preemption by Title VII.

Appendix C

D. CSRA Preemption

The Civil Service Reform Act ("CSRA") provides a comprehensive system for redressing personnel grievances. *See Saul v. United States*, 928 F.2d 829, 833-34 (9th Cir. 1991). The CSRA offers an administrative remedy to federal employees who allege "prohibited personnel practices." *Id.* at 833. In *Saul*, the Ninth Circuit interpreted broadly the phrase "prohibited personnel practices." The court found that "Congress *did* expect 'prohibited personnel practices' to cover supervisors' violations of employees' constitutional and privacy rights." *Id.* at 834 (emphasis added). As this Court noted in *Kent*:

> The [CSRA] describes "personnel actions" as including an appointment, a promotion, a disciplinary or corrective action, a transfer, a reinstatement, a restoration, a reemployment, a performance evaluation, a decision concerning pay, benefits or any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level. 5 U.S.C. § 2302(a)(2)(A)(i)-(x).

Kent, 801 F. Supp. at 333.

Plaintiff's remaining allegations involving conduct regarding Defendant denying benefits, taking legal recourse, misleading a congressional representative, and other administrative acts, do not overcome the preemptive effect of CSRA. Consequently, as this Court previously ruled, the CSRA

preempts Plaintiff's emotional distress causes of action insofar as they have not already been preempted by Title VII.[3]

III. Conclusion

Plaintiff's FTCA causes of action are either time barred or preempted by Title VII and the CSRA. Accordingly, this Court lacks subject matter jurisdiction over Plaintiff's Amended Complaint. Defendants motion to dismiss is granted. Plaintiff's Amended Complaint is dismissed without leave to amend.

IT IS SO ORDERED:

Date: 1/8/96

s/ John S. Rhoades, Sr.
John S. Rhoades, Sr.
United States District Judge

Copies to:

All Parties

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3. Since this Court has determined that both of Plaintiff's FTCA causes of action are either time barred or preempted by a combination of Title VII and the CSRA, this Court need not determine whether his causes of action also are preempted by the FECA, 5 U.S.C. § 8101 *et seq.*

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-55363

D.C. No. CV-94-01167-JSR
Southern California
(San Diego)

LARRY COOPER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Before: BROWNING, THOMPSON, and HAWKINS, Circuit Judges.

The petition for rehearing is denied.